SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 873

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

NEW YORK TRUST COMPANY, AS TRUSTEE UNDER TRUST INDENTURE, DATED DECEMBER 24, 1921, BY AND BETWEEN CONRAD HENRY MATTHIESSEN AND SAID THE NEW YORK TRUST COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 Before United States Board of Tax Appeals

Docket No. 28250

THE NEW YORK TRUST COMPANY, AS TRUSTEE UNDER TRUST INDENTURE, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Company, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Entries.

Appearances:
For Taxpayer: Russell D. Morrill, Esq., Henry Mannix, Esq.
For Comm'r.: Brooks Fullerton, Esq., J. F. Greaney, Esq., Stanley Suydam, Esq.

1927

May 9—Petition received and filed. Taxpayer notified.
" 10—Copy of petition served on general counsel.
July 8—Answer filed by general counsel.
" 11—Copy of answer served on taxpayer. General Calendar.

1929

Aug. 14—Hearing set November 26, 1929.
Nov. 2—Notice of change of hearing to December 9, 1929.
Dec. 7—Amended answer filed by general counsel. December 9, 1929 copy served on taxpayer.
2 Dec. 9—Hearing had before Mr. McMahon. Submitted. Ordered amendment to petition granted and dictated into record also amendment to answer granted and dictated into record. Stipulations dictated into record. Briefs due January 5, 1930.
Dec. 30—Transcript of hearing of December 9, 1929, filed.

1930

Jan. 4—Brief filed by taxpayer.
" 4—Motion for extension to January 15, 1930, to file brief filed by general counsel. January 4, 1930, granted.
" 13—Brief filed by general counsel.
June 26—Findings of fact and opinion rendered, Stephen J. McMahon, division 16. Proceeding will be dismissed for lack of jurisdiction.
" 30—Decision entered, Logan Morris, division 14.
Dec. 20—Petition for review by United States Circuit Court of Appeals (2) with assignments of error filed by general counsel.
" 27—Proof of service filed. (G. B. Paull.)
" 27—Proof of service filed. (White & Case.)

1931

Jan. 27—Motion for extension to March 1, 1931, to complete and transmit record filed by general counsel.

Jan. 30—Order enlarging time to March 2, 1931, for preparation of evidence and delivery of record entered.

3 Feb. 24—Praecipe filed by general counsel.

" 27—Motion for extension to March 20, 1931, to complete and transmit record filed by general counsel.

Mar. 2—Proof of service of praecipe filed. (White & Case.)

" 2—Proof of service of praecipe filed. (New York Trust Co.)

" 2—Order enlarging time to March 20, 1931, for transmission and delivery of record entered.

" 20—Order enlarging time to April 30, 1931, for transmission and delivery of record entered.

Apr. 22—Order enlarging time to May 30, 1931, for transmission and delivery of record entered.

May 16—Transcript of record sur petition for review sent clerk of the United States Circuit Court of Appeals in New York City.

Dec. 24—Mandate from United States Circuit Court of Appeals (2) reversing Board's decision filed.

1932

May 3—Stipulation of facts and briefs to be filed before September 15, 1932, filed. Approved.

Sept. 14—Motion for extension to September 26, 1932, to file brief filed by general counsel. September 14, 1932, granted to September 26, 1932.

" 15—Brief filed by taxpayer.

" 26—Brief filed by general counsel.

4 1933

Apr. 10—Findings of fact and opinion rendered, Stephen J. McMahon, division 16. Decision will be entered for the respondent.

" 11—Decision entered, Stephen J. McMahon, division 16.

June 28—Petition for review by United States Circuit Court of Appeals (2) with assignments of error filed by taxpayer.

July 1—Proof of service filed by taxpayer.

June 29—Praecipe for record filed by taxpayer.

July 1—Proof of service filed.

Before United States Board of Tax Appeals

[Title omitted.]

Petition

Filed May 9, 1927

The above-named petitioner hereby petitions for a redeter-
5 mination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT: PA: 3-60D-JHJ, dated March 12, 1927, and as a basis of its proceedings alleges as follows:

1. The petitioner is a corporation duly organized under the banking law of the State of New York, with its principal office at no. 100 Broadway, New York City.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on March 12, 1927.

3. The taxes in controversy are income taxes for the calender year 1922 and in the sum of $238,275.96.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The respondent has erroneously determined petitioner's gross income for the year 1922 in that he has incorrectly computed the profit realized in that year upon the sale of 6,000 shares of the common stock of Corn Products Refining Company, such profit having been computed by using as a basis the cost of said stock to petitioner's grantor pursuant to the provisions of section 202 (a) (2) of the revenue act of 1921, instead of its fair market value on the date it was acquired by petitioner.

(b) Insofar as section 202 (a) (2) of the revenue act of
6 1921 purports to authorize respondent to tax to petitioner an alleged profit upon the sale of the stock referred to in the preceding paragraph, computed by using as a basis the cost of said stock to petitioner's grantor, said section is unconstitutional and void.

(c) In the event the board finds that section 202 (a) (2) of the Revenue Act of 1921 is constitutional and that the basis used by respondent in computing the profit referred to in the preceding paragraph was correct, then respondent erred in computing the tax upon said profit at the full nominal and surtax rates instead of at the rate of 12½% in accordance with section 206 of the Revenue Act of 1921.

5 The facts upon which the petitioner relies as the basis for this proceeding are as follows:

(a) The petitioner is a corporation organized under the banking law of the State of New York, with its principal office at 100 Broadway, New York City.

(b) By an irrevocable indenture, dated December 24, 1921, Conrad Henry Matthiessen transferred six thousand (6,000) shares of the common stock of Corn Products Refining Company to petitioner in trust to collect the income and dividends therefrom and accumulate the same until such time as his son, Erard A. Matthiessen, should attain the age of 21 years, at which time petitioner was directed to pay over all such accumulated income to said son. Thereafter and
7 until said Erard A. Matthiessen, should attain the age of 25 years petitioner was directed to pay the income of the fund to him currently, and upon his reaching such age, to pay over the principal to him. In the event that said Erard A. Matthiessen should die before reaching the age of 25 years, it was provided that petitioner should pay over the principal in equal

shares to two other sons of the grantor. A copy of the above-mentioned indenture is attached hereto and marked "Exhibit B."

(c) Upon information and belief, the six thousand (6,000) shares of the common stock of Corn Products Refining Company, referred to in the preceding paragraph, were acquired by Conrad Henry Matthiessen on April 27, 1906, at a cost of $141,375, which cost exceeded the value of said shares on March 1, 1913.

(d) On December 24, 1921, the date on which the six thousand (6,000) shares of the common stock of Corn Products Refining Company, above referred to, were acquired by petitioner, they had a fair market value of not less than $96.25 per share, or a total fair market value of not less than $557,500.

(e) During the year 1922 the petitioner sold the six thousand (6,000) shares of the common stock of Corn Products Refining Company, above referred to, receiving therefor the net amount of $603,385.

(f) In computing the profit realized by petitioner upon the sale referred to in the preceding paragraph the respondent used as a basis the cost of such stock to Conrad Henry Matthiessen, referred to in paragraph 5 (c) above, instead of its fair market value as of
8 the date it was acquired by petitioner as set forth in paragraph 5 (d) above.

Wherefore, the petitioner prays that this board may hear the proceeding and disallow the alleged deficiency as set forth in paragraph 3 supra, to the extent of at least $237,458.79.

Respectfully submitted.

RUSSELL D. MORRILL,
Counsel for Petitioner,
14 Wall Street, New York City

[*Duly sworn to by Boyd G. Curtis, jurat omitted in printing.*]

9 *Exhibit "A" to petition*

TREASURY DEPARTMENT,
Washington, March 12th, 1927.

IT:PA:3-60D:JHJ.

Mr. ERARD MATTHIESSEN,
% New York Trust Company, Trustee,
100 Broadway, New York, New York.

SIR: The determination of your income-tax liability for the taxable year 1922, as set forth in office letter dated February 8, 1927, disclosed a deficiency in tax amounting to $238,275.95, as shown in the attached statement.

In accordance with the provisions of section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D.C., and must

be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the collector of internal revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed form A, and forward it to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:PA:3-60D:JHJ. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. R. NASH.
Assistant to the Commissioner.

Inclosures: Statement; form A; form 882.

STATEMENT

In re: Mr. Erard Matthiessen, % the New York Trust Company, trustee, 100 Broadway, New York, New York.

Year	*Deficiency in tax*
1922	$238,275.95

Under date of February 8, 1927, you were advised that the report of the internal-revenue agent in charge at New York, New York, a copy of which was furnished you under date of May 22, 1926, had been reviewed in this office and approved as submitted.

The deficiency in tax of $238,275.95 resulted from the adjustment of income from sale of 6,000 shares of Corn Products Refining Company stock assigned by Conrad H. Matthiessen in 1921 to the New York Trust Company, as trustee, for your benefit.

In determining taxable profit from this transaction the examining officer used the difference between the selling price and the original cost of this stock to the donor, Conrad H. Matthiessen.

In a conference held in this office it was contended that taxable profits represented the difference between the selling price and the value of the stock at the time it was transferred to the trustee in 1921.

After careful consideration of the evidence submitted it is held that the profit as computed under article 1562, Regulations 62, is correct, and the findings by the examining officer are therefore sustained.

Payment of the tax should not be made until a bill is received from the collector of internal revenue for your district, and remittance should then be made to him.

Exhibit "B" to petition

This indenture, dated the 24th day of December, 1921, by and between Conrad Henry Matthiessen, of New York City (hereinafter called the "grantor"), party of the first part, and the New York Trust Company, a New York corporation having its principal place of business at 100 Broadway, New York City (hereinafter
12 called the "trustee"), party of the second part: Witnesseth:

Whereas the grantor desires to create a trust for the benefit of his son Erard A. Matthiessen, in the manner hereinafter set forth, and the trustee is willing to accept and execute such trust.

Now, therefore, in consideration of the premises and of the mutual covenants and agreements hereinafter set forth and for and in consideration of the sum of ten dollars ($10) by each of the parties hereto to the other in hand paid, the grantor has sold, assigned, transferred, and conveyed unto the trustee and, by these presents, does sell, assign, transfer, and convey unto the trustee, six thousand shares of the common stock of Corn Products Refining Company, in trust, nevertheless, for the benefit of Erard A. Matthiessen, and to be administered by the trustee under the following terms and conditions:

First. The trustee shall hold the said shares of stock or the avails thereof if said shares or any part thereof shall be sold, and any other securities or property purchased out of such avails, and collect the dividends and income therefrom and, until the twenty-first birthday of the said Erard A. Matthiessen, accumulate such dividends and income, investing such accumulations whenever practicable and convenient. When the said Erard A. Matthiessen attains his twenty-first birthday, the trustee shall pay over to him all of the cash or securities representing such accumulations of income and
13 thereafter the trustee shall pay to the said Erard A. Matthiessen the net income derived by the trustee from the trust estate hereby created until the said Erard A. Matthiessen shall attain the age of twenty-five years, whereupon the trustee shall pay over to the said Erard A. Matthiessen all of the trust estate as it then exists, both principal and any accrued but undistributed income, and the trust hereby created shall cease and come to an end.

Second. So long as the grantor is living, the trustee shall not sell and dispose of any of the shares of stock hereby conveyed or any other securities held as a part of the trust estate nor reinvest any cash at any time constituting a part of the trust estate without the written consent and approval of the grantor.

If the grantor shall die before the said Erard A. Matthiessen attains the age of twenty-five years then the trustee may sell the shares hereby conveyed or any other securities constituting any part of the trust estate and invest any cash constituting a part of the trust

estate in its discretion and in accordance with its best judgment, having in view the duration and nature of the trust; and the grantor hereby expressly releases the trustee from the limitations in respect of investment of trust funds which are provided by the laws of the State of New York.

Any dividends received by the trustee payable in stock of any corporation shall be added to the corpus of the trust estate unless and until the trustee is advised by counsel that such addition to the corpus constitutes in whole or in part an accumulation pro-
14 hibited by the laws of the State of New York, in which event the trustee shall pay over to the said Erard A. Matthiessen such part of such dividend as shall represent such illegal accumulation.

Third. If the said Erard A. Matthiessen shall die before attaining the age of twenty-five years, the trustee shall pay over the entire trust estate as it then exists in equal shares to C. H. Matthiessen, Jr., and Ralph H. Matthiessen, sons of the grantor, and the trust hereby created shall cease and come to an end.

Fourth. The grantor reserves the right to add to the corpus of the trust hereby created at any future time prior to the twenty-fifth birthday of the said Erard A. Matthiessen by delivering to the trustee additional securities or property to be held by the trustee under the terms and conditions of this agreement.

This agreement shall be deemed to be created and shall be administered under the laws and practice of the State of New York, and all rights of beneficiaries hereunder shall be determined by such laws.

Fifth. The trustee may keep shares of stock hereby conveyed and any other shares of stock or other securities hereafter acquired by it as a part of the trust estate in such name or names as shall be most convenient and practicable. The trustee shall not be liable for any loss to the trust estate for any investment made at the direction of the grantor nor for any loss or damage arising out of any investment made by it in the exercise of its power hereinabove granted to it, provided such investment shall be made in good
15 faith. The trustee shall not be liable except for its gross negligence or wilful misconduct. The trustee shall be entitled to a commission of ¼ of 1% on the principal, one-half to be paid on receiving the property and one-half upon paying out the principal at the termination of the trust estate, and shall be entitled to commissions on income at the rate of 1% of the annual income of the trust estate. The trustee may retain counsel or other agents or representatives necessary in the administration of the trust estate.

Sixth. The trustee accepts the trust hereby created.

Seventh. This agreement shall bind the heirs, executors, administrators, and assigns of the grantor and the successors and assigns of the trustee.

In witness whereof the grantor has hereunto subscribed his name and affixed his seal, and the trustee has caused this instrument to be executed by its vice president and its corporate seal to be affixed, duly attested by its secretary, the day and year first above written.

CONRAD HENRY MATTHIESSEN,
THE NEW YORK TRUST COMPANY,
By H. W. MORSE, *Vice President.*

Signed, sealed, and delivered in the presence of:
[SEAL] C. H. MATTHIESSEN, Jr.
Attest:
E. G. CURTS, *Secretary.*

16 Before United States Board of Tax Appeals

[Title omitted.]

Answer

Filed July 8, 1927

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, general counsel, Bureau of Internal Revenue, in answer to the petition in the above-entitled proceeding admits and denies as follows:

1. Admits the allegation set forth in the paragraph of the petition numbered 1.

2. Admits the allegation set forth in the paragraph of the petition numbered 2.

3. Admits the allegations set forth in the paragraph of the petition numbered 3.

17 4. Denies that the determination of the deficiency tax is based upon errors as alleged in the paragraph of the petition numbered 4.

5. (a), (b), (c), (e), and (f). Admits the allegations set forth in subparagraphs (a), (b), (c), (e), and (f) of the paragraph of the petition numbered 5.

(d) Denies the allegation set forth in subparagraph (d) of the paragraph of the petition numbered 5 for the reason that the commissioner has no knowledge of the facts alleged or information thereof, except as stated in the petition, sufficient to form a belief as to the truth of the allegations.

6. Denies each and every material allegation of fact contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore it is respectfully prayed that the determination of the commissioner be approved.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue.

Of counsel:
J. F. GREANEY,
Special Attorney, Bureau of Internal Revenue.

18 Before United States Board of Tax Appeals

[Title omitted.]

Amended answer

Filed Dec. 7, 1929

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, for amended answer to the petition herein admits and denies as follows:

1. Admits the allegation set forth in the paragraph of the petition numbered 1.

2. Admits that the notice of deficiency was mailed to the petitioner on March 12, 1927, and that the copy of said deficiency letter attached to the petition is a true copy.

3. Admits the allegation set forth in the paragraph of the petition numbered 3.

19 4. Denies that the determination of the deficiency tax is based upon errors as alleged in the paragraph of the petition numbered 4.

5. (a-f) Admits the allegations set forth in subparagraphs (a) to (f), inclusive, of paragraph of the petition numbered 5.

Respondent alleges:

That immediately prior to May 22, 1926, Internal Revenue Agent Aaron J. Auerbach made an examination of petitioner's records as trustee for the benefit of Erard Matthiessen, a minor, under indenture dated December 24, 1921, and submitted a report thereon under date of May 22, 1926.

That a copy of said report was transmitted by the supervising internal-revenue agent at New York City to petitioner by letter of transmittal dated June 28, 1926, addressed "New York Trust Company, as trustee for Erard Matthiessen (a minor) of indenture dated December 24, 1921, 100 Broadway, New York."

That a copy of said report was transmitted by the supervising internal-revenue agent at New York City to the Commissioner of Internal Revenue by letter dated August 28, 1926.

That on September 15, 1926, the petitioner filed a protest to the recommendation of the internal-revenue agent, bearing a title on the face thereof—

"In the matter of the income-tax liability of the New York Trust Company as trustee for Erard Matthiessen (a minor) for the year 1922. Protest against additional tax liability proposed in a letter of the supervising internal-revenue agent dated June 28,

20 1926", which said protest was signed and verified by G. B. Paull, as assistant secretary of petitioner.

That a letter from the assistant to the Commissioner of Internal Revenue dated February 8, 1927, addressed, "Mr. Erard Matthies-

sen, % New York Trust Company, trustee, 100 Broadway, New York, New York", was sent to the petitioner advising that the revenue agent's report had been reviewed and disclosed a deficiency in tax for the year 1922 amounting to $238,275.95; that a "statement", which was an integral part of said letter, was attached to said deficiency letter and referred to the aforesaid report of the revenue agent dated May 22, 1926.

That by letter dated February 16, 1927, petitioner, as trustee for the Erard Matthiessen trust, requested a hearing in respect of said deficiency.

That by letter of February 25, 1927, addressed and sent to "New York Trust Company, trustee, Erard Matthiessen trust, 100 Broadway, New York, New York", C. R. Nash, assistant to the Commissioner of Internal Revenue, by E. A. Cook, assistant head of division, denied petitioner's request for postponement of said hearing, but later postponed said hearing to March 7, 1927, at which time a hearing was held, petitioner being represented by Russell D. Morrill, attorney of record for petitioner in this appeal.

That on March 12, 1927, the ~~deficiency letter, a true~~ copy of which (as heretofore admitted) is attached to the petition, was (as heretofore admitted) mailed to petitioner.

That by letter dated April 29, 1927, addressed and mailed to
21 "New York Trust Company, trustee, Erard Matthiessen (minor), 100 Broadway, New York, New York", C. R. Nash, assistant to the Commissioner of Internal Revenue, in response to a request from petitioner's counsel, amplified the statement which accompanied and is a part of the deficiency letter, and ruled in regard to the application of section 206 of the revenue act of 1921 to the instant appeal.

Denies each and every allegation of fact contained in said petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore it is prayed that the determination of the commissioner be affirmed.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
BROOKS FULLERTON,
Special Attorney, Bureau of Internal Revenue.
12/7/29.
[File endorsement omitted.]

22 Before United States Board of Tax Appeals

Docket No. 28250

NEW YORK TRUST COMPANY, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Statement of evidence

Filed Dec. 30, 1929

[Reporter's minutes].

Hearing at Washington, D.C., on the 9th day of December 1929, at 12:15 o'clock p.m.

The above-entitled cause came on for hearing on this the 9th day of December, A.D. 1929, before the honorable Stephen McMahon, member of the United States Board of Tax Appeals, at Washington, D.C., pursuant to notice of hearing heretofore given, whereupon the following proceedings were had and testimony heard, to wit:

APPEARANCES

Russell D. Morrill, Esq., 14 Wall Street, New York City, and Henry Mannix, Esq., 14 Wall Street, New York City, appearing on behalf of the petitioner;

Brooks Fullerton, Esq., (Clarence M. Charest, Esq., general counsel, Bureau of Internal Revenue), on behalf of the Commissioner of Internal Revenue, respondent.

23 PROCEEDINGS

The CLERK. The appeal of the New York Trust Company against the Commissioner of Internal Revenue, Docket No. 28250. For the petitioner, Mr. Russell D. Morrill, 14 Wall Street, New York City, and Mr. Henry Mannix, 14 Wall Street, New York City; for the respondent, Mr. Brooks Fullerton.

The MEMBER. How long will this case take?

Mr. MANNIX. Fifteen minutes, I think; we have agreed to the submission in evidence of certain exhibits, certain stipulations—we have already agreed to that, and I would just merely like to take about five minutes to point out the technical differences that are being raised in the matter, and then ask for permission to submit a brief, if the court feels it is not prepared to decide the case from the bench.

The MEMBER. I think we ought to recess now until 2 o'clock.

Mr. MANNIX. May I say this, Your Honor; I have an appointment for a hearing at 2 o'clock in the Income Tax Unit, and if you could allow us the time now to put this case in——

The MEMBER. Very well; we will accommodate you; may we have an opening statement from you at this time.

Opening statement on behalf of petitioner

Mr. MANNIX. The tax liability involved in this proceeding has to do with a profit alleged to have been derived on the sale of
24 6,000 shares of common stock of Corn Products Refining Company in the year 1922, held in the trust fund.

The donor of the trust was Conrad H. Matthiessen; the trustee is the New York Trust Company, of New York City; the primary beneficiary of this trust fund is Erard Matthiessen. The trust was created December 24, 1921.

There are two questions involving the merits of the liability and one involving a technical matter.

A return was filed by the trustee for the year 1922, reporting a profit on the sale of this stock based on value at the date of the creation of the trust. The Government has raised the question whether the profit should be measured by the cost of this stock to the donor of the trust, so that the first question on the merits is whether or not the value at the date of creation of the trust or the cost of the stock to the donor constitutes the basis for computing the profit.

The MEMBER. Would there be any substantial difference?

Mr. MANNIX. A very substantial difference.

The MEMBER. An increase in value?

Mr. MANNIX. Yes, sir.

The second question is whether, if the profit must be measured by the cost to the donor, the period during which the donor held the stock, prior to the creation of the trust, may be added to the period during which the trustee held the stock up to the date of sale in order to determine whether or not the stock was held for two years or more, in ascertaining whether or not the profit should be taxed at the twelve and one half percent capital gain rate.

25 Those are the two questions effecting the merits.

The third question, which is a technical matter, relates to whether or not the board has jurisdiction of this proceeding.

The thirty-day letter, which will be introduced in evidence, purports to be addressed to Mr. Erard Matthiessen, who is the beneficiary of the trust. I think the Government will concede there is no liability for the tax on the part of Erard Matthiessen, because he is the beneficiary, and the liability is on the trustee, if any.

The petition in the case was filed in the name of the trustee, and the defense that is raised, or about to be raised, by the petitioner is that the sixty-day letter is not a notice of deficiency, within the requirements of the statute, addressed to the New York Trust Company, as trustee, and that therefore the board has no jurisdiction to enter a deficiency assessment against the New York Trust Company as trustee.

Further that the board has no jurisdiction, or will have no jurisdiction, to enter a deficiency assessment against the beneficiary to whom the deficiency letter is addressed, for the reason that the record

in issue and the evidence in the case will show that as a matter of law there is no liability for tax on this profit of this beneficiary.

That, I think, outlines the questions involved, and if Mr. Fullerton has no objection, we will proceed with the introduction of the formal evidence.

The MEMBER. Do you wish to be heard, Mr. Fullerton?

26 Mr. FULLERTON. Just a short statement on the part of the respondent.

The MEMBER. Proceed.

Opening statement on behalf of respondent

Mr. FULLERTON. The respondent's position in regard to these questions on the merits is that the establishment of a trust and the turning of property over to the trustee is a gift, and that this giving has the same effect as though the gift were made to an individual and that when securities are sold by the trustee, the cost basis for determining profit would be the cost to the donor of the trust.

The matter is very substantial; the tax is for the year 1922, and the deficiency determined, on account of this difference of cost basis, amounts to a tax of two hundred and thirty-eight thousand dollars odd.

The petitioner's counsel has stated the matter, the other matter, on the merits.

The evidence will show that in regard to the jurisdictional question, that there was a clerical error in the sixty-day letter; but the record, the complete record, will be introduced in evidence to show that the trustee received several letters, had several conferences, and made several protests in regard to the matter; that nobody was under any mistake as to whom the Government's tax—or from whom the Government contended the tax was due, and that, the error being clerical the board has jurisdiction.

Motion to amend petition

Mr. MANNIX. The first thing I would like to do is to move

27 to amend our petition. I have already advised Mr. Fullerton of my intention to so move, and I do not think he will object to the amendment which I want to make.

As a matter of fact we received—I have not yet—well, I received a copy of an amended answer, filed on Saturday by Mr. Fullerton, due to the raising of this technical question of jurisdiction.

I wish to amend paragraph 2 of the petition so as to read as follows:

"The notice of deficiency (a copy of which is attached and marked 'Exhibit A') was mailed to Erard Matthiessen on March 12, 1927."

Mr. FULLERTON. No objection.

Mr. MANNIX. I wish to amend paragraph 4 (a) of the petition so as to read:

"The respondent has erroneously determined Erard Matthiessen's gross income for the year 1922", and so forth.

Mr. FULLERTON. No objection.

Mr. MANNIX. I wish to amend paragraph 4 (b) to read:

"(b) Insofar as section 202 (a) (2) of the revenue act of 1921 purports to authorize respondent to tax petitioner or Erard Matthiessen, an alleged profit upon the sale", and so forth, as the petition now stands.

Mr. FULLERTON. No objection.

Mr. MANNIX. I wish to add a new error, to be known as paragraph 4 (d) to read:

"That said Erard Matthiessen is not liable, as a matter of law, for any income tax on any profit derived on the sale of said Corn Products Refining Company stock."

Mr. FULLERTON. No objection.

28 Mr. MANNIX. I wish to amend the last paragraph in the petition so as to read as follows:

"Wherefore the petitioner prays that this board may hear the proceeding and disallow the alleged deficiency as set forth in paragraph 3, supra."

Omitting the following words from that paragraph:

"To the extent of at least $237,458.79."

In other words, as to the last amendment, I wish to request the disallowance of the deficiency en toto.

Those are the only motions with respect to amendments to the petition that I wish to make.

The MEMBER. You have no objection.

Mr. FULLERTON. I have no objection; but I would ask that the petition, as amended, be considered as denied by the respondent.

The MEMBER. Do you mean you wish to deny the allegations of fact?

Mr. FULLERTON. I wish the record to show that as the petition now stands the allegations which are contained in the amended portions are denied in the same instances where they were denied in the respondent's amended answer.

The MEMBER. Well, the motion to amend is granted, and counsel for the respondent is now permitted to enter an oral denial to these amendments in the record.

Mr. FULLERTON. That is satisfactory.

Mr. MANNIX. If Your Honor please, I want to make it clear just what position the respondent is taking, because before making this amendment I discussed the matter with him, and rather than

29 to have it appear that he has denied any of the material allegations of our petition, either of fact or of error contained in the original petition, which would require the introduction by me of evidence to meet such denials, I would prefer to withdraw any motion to amend and let the original petition stand as it was originally filed.

Now, I understood, in making the motion to amend, the only objection which Mr. Fullerton would make would be to paragraph

2, that he would deny that the notice of deficiency was mailed to Erard Matthiessen, but would not deny that the exhibit A attached was a true copy of the notice of deficiency.

Mr. FULLERTON. The allegation in regard to the true copy was not admitted; I merely wish to keep the record clear so that there were not new allegations here which had not been heretofore denied, that would stand as undenied. As the board expressed the matter, it was satisfactory to the respondent.

Mr. MANNIX. In other words, then, Mr. Fullerton merely denies any new allegations set forth in the proposed amendment, but does not deny any allegations previously admitted.

Mr. FULLERTON. Correct.

Mr. MANNIX. In his original answer.

The MEMBER. That is my understanding; so, now, then, to make it perfectly clear, the motion to amend the petition having been granted, you wish the record to show, as attorney for the respondent, that you deny the allegations now set forth in the amendments to the petition. Is that right?

Mr. FULLERTON. Yes; that is correct.

The MEMBER. I think that covers the situation.

30 Mr. MANNIX. It does not deny any of the allegations previously made in the original petition which were admitted by the respondent in his original answer?

The MEMBER. Yes; it is understood that there is no denial of the allegations of the original petition except those that were denied in the original answer to the original petition.

Mr. FULLERTON. Make that the amended answer to the original petition.

The MEMBER. All right, if that is agreeable to you. Now, Mr. Fullerton, let us dispose of this; I will let it stand the way I had it, that you are making no denial of anything that is admitted in the respondent's original answer to the original petition.

Mr. FULLERTON. The respondent's amended answer to the original petition.

The MEMBER. No; original answer to the original petition.

Mr. FULLERTON. I beg your pardon; there is an original answer and amended answer now on file; that was the reason I asked for that one correction.

Mr. MANNIX. That amended answer was not served on me; I received it this morning. If you will assure the court and myself that you have not denied anything which was admitted in your original answer, I am satisfied to let it rest as you have stated it.

Mr. FULLERTON. There is nothing denied in the amended answer which was admitted in the original answer, except in one instance where the original answer denied, for lack of information; the

31 amended answer denies outright one particular fact, but that is the fair market value of the security at the date of the establishment of the trust, and we will stipulate that.

Mr. MANNIX. It is satisfactory to let the record stand.

The MEMBER. All right. Now, let the record show the motion to amend the petition, as set forth by counsel for the petitioner, is granted; and the counsel for the respondent is permitted to enter a denial of those allegations as set forth in the amendment to the petition, provided there are no denials different than the denials contained in the amended answer of the respondent which is on file and which is about to be offered. Is that right?

Mr. FULLERTON. That is satisfactory to the respondent.

Mr. MANNIX. I now offer in evidence the original——

The MEMBER. Let us get the pleadings straightened up. Now, you have an amended answer you want to offer; it is on file but has not been acted on by the Board.

Mr. FULLERTON. Yes; the respondent will offer the amended answer.

The MEMBER. Is there any objection to that?

Mr. MANNIX. No.

The MEMBER. The motion of counsel for the respondent to be permitted to amend the answer of the respondent is granted, and the amended answer filed by the Board on December 7, 1929, is received as the answer of the respondent in this case.

Mr. MANNIX. Shall I proceed?

The MEMBER. Proceed.

32 *Offers in evidence*

Evidence for the petitioner

(Thereupon the petitioner, to maintain the material averments of its petition, introduced the following proof):

Mr. MANNIX. I now offer in evidence the original deed of trust, dated December 4, 1921, by and between Conrad Henry Matthiessen and the New York Trust Company.

Mr. FULLERTON. No objection.

The MEMBER. Mark it, Mr. Clerk.

Mr. MANNIX. I request permission to introduce, in lieu of the original trust indenture, a certified copy thereof with the same force and effect as if the original had been allowed to remain on file with the Board.

Mr. FULLERTON. No objection.

The MEMBER. You may mark the photostatic copy, then, as "Petitioner's Exhibit No. 1." Is that right, Mr. Clerk?

The CLERK. That is right, Your Honor.

The MEMBER. Petitioner's exhibit no. 1 will be received in evidence, there being no objection.

(The photostatic copy of trust certificate, so identified and received in evidence, was thereupon marked "Petitioner's Exhibit No. 1", and is made a part of this record.)

Mr. MANNIX. I offer in evidence, the original alleged notice of deficiency, being a letter from the Commissioner of Internal Revenue, dated March 12, 1927.

The MEMBER. Is there any objection to this, Mr. Fullerton?

Mr. FULLERTON. No objection.

33 The MEMBER. That exhibit will be marked "Petitioner's Exhibit No. 2", and will be received in evidence.

(The document so identified and received in evidence was thereupon marked "Petitioner's Exhibit No. 2", and is made a part of this record.)

Mr. MANNIX. I offer in evidence the original income-tax return for the year 1922 filed by the New York Trust Company as trustee for Erard Matthiessen, a minor.

Mr. FULLERTON. No objection.

The MEMBER. The return will be marked "Petitioner's Exhibit No. 3", and will be received in evidence.

(The document so identified and received in evidence was thereupon marked "Petitioner's Exhibit No. 3", and is made a part of this record.)

Mr. MANNIX. There are now to be made of record one or two stipulations of fact. Will you read the stipulations of fact?

The MEMBER. Are there any depositions in this case?

Mr. MANNIX. No, Your Honor; everything is admitted in the answer that is required.

Stipulation

Mr. FULLERTON. It is stipulated that the Commercial and Financial Chronicle as of December 24, 1921, shows quotations for the common stock of the Corn Products Refining Company as follows, high 96½, low 96, and that actual sales were made at those prices on the New York Stock Exchange on that date.

34 The MEMBER. You have heard the stipulation just stated, Mr. Mannix: Is that acceptable to you?

Mr. MANNIX. That is acceptable to me.

The MEMBER. The stipulation will be received as evidence of the market value of this stock on the date in question. Is that what it is for?

Mr. MANNIX. That is satisfactory; that is the purpose of it.

Mr. FULLERTON. The respondent would rather not admit that that was the market value; we will admit that that was what the actual sales on the exchange showed at that time, and that sales were made at that figure.

The MEMBER. Well, I have said that this stipulation is being received in evidence, as evidence—some evidence of the market value of that stock on that date.

Mr. FULLERTON. Yes.

Mr. MANNIX. That is the purpose of that stipulation.

Stipulation

Mr. MANNIX. A further stipulation, I understand, is satisfactory to Mr. Fullerton:

It is stipulated no Federal income-tax return was filed by Erard Matthiessen or by anyone in his behalf for the year 1922.

Mr. FULLERTON. Correct.

The MEMBER. You mean other than petitioner's exhibit 3; that, we claim, is an income-tax return filed by the trustee for the trust. Restate your stipulation.

Mr. MANNIX. It is stipulated no Federal income-tax return
35 was ever filed by Erard Matthiessen or by anyone in his behalf for the year 1922.

The MEMBER. You have heard the stipulation, Mr. Fullerton?

Mr. FULLERTON. Correct.

The MEMBER. Is that acceptable to you?

Mr. FULLERTON. It is.

The MEMBER. The stipulation will be received in evidence.

Stipulation

Mr. MANNIX. It is stipulated that Erard Matthiessen did not reside at 100 Broadway, New York, New York, nor use that as his address for any purpose at any time.

Mr. FULLERTON. That is correct.

The MEMBER. You have heard the stipulation.

Mr. FULLERTON. Yes.

The MEMBER. The stipulation is received.

Mr. MANNIX. Those are the only stipulations and offers in evidence I wish to make; Mr. Fullerton, I think, wishes to offer something.

The MEMBER. All right; then you rest, Mr. Mannix?

Mr. MANNIX. I rest.

Offers in evidence

Evidence for the respondent

(Thereupon the respondent, to maintain the issues on his part, introduced the following proof):

Mr. FULLERTON. The respondent offers a copy of the revenue agent's report upon the New York Trust Company, as trustee
36 for Erard Matthiessen, for the years 1922 and 1923. It is agreed between counsel that no objection will be made because this is a copy and not an original.

Mr. MANNIX. That is correct, but I do——

The MEMBER. You have other objections?

Mr. MANNIX. I wish to object on the ground——

The MEMBER. Let us have it marked—is there more than one?

Mr. FULLERTON. There are a number of exhibits; this is the first one.

Mr. MANNIX. Your Honor, I will make the same objection to all of these exhibits; perhaps it might be well to reserve my right to object to them.

The MEMBER. That will be marked "Respondent's Exhibit A."

(The revenue agent's report, so identified and received in evidence, was thereupon marked "Respondent's Exhibit A", and is made a part of this record.)

Mr. FULLERTON. Perhaps I should state that the exhibit contains the report mentioned and the subsequent correspondence down to the sixty-day letter, and one letter after that.

The respondent offers in evidence the letter from the supervising internal-revenue agent at New York to the New York Company—New York Trust Company, as trustee for Erard Matthiessen, dated June 28, 1926, and purporting to transmit to the petitioner the document which is the revenue agent's report just offered.

The MEMBER. Is this an original or a copy?

Mr. FULLERTON. This is a copy.

The MEMBER. Mark it "Respondent's Exhibit B."

37 (The document so identified and received in evidence was thereupon marked "Respondent's Exhibit B", and is made a part of this record.)

Mr. FULLERTON. Respondent offers the letter from the supervising revenue agent at New York to the Bureau of Internal Revenue, transmitting copy to that bureau of what is marked as respondent's exhibit A.

The MEMBER. It will be marked "Respondent's Exhibit C" for identification.

(The document so identified was thereupon marked "Respondent's Exhibit C", for identification.)

Mr. FULLERTON. Respondent offers a protest dated September 15, 1926, by the petitioner to the recommendation in the revenue agent's report.

The MEMBER. It will be marked "Respondent's Exhibit D" for identification.

(The document so identified was thereupon marked "Respondent's Exhibit D", for identification.)

Mr. FULLERTON. The respondent offers a letter with a statement attached, which is part of the letter dated February 8, 1927, from the Assistant to the Commissioner of Internal Revenue, addressed to Mr. Erard Matthiessen, % New York Trust Company, trustee.

The MEMBER. It will be marked "Respondent's Exhibit E", for identification.

(The document so identified was thereupon marked "Respondent's Exhibit E", for identification.)

Mr. FULLERTON. Respondent offers a letter dated February

38 16, 1927, from the New York Trust Company to the Commissioner of Internal Revenue.

The MEMBER. It will be marked "Respondent's Exhibit F", for identification.

(The document so identified was thereupon marked "Respondent's Exhibit F", for identification.)

Mr. FULLERTON. Respondent offers a copy of a letter dated February 25, 1927, from the assistant to the commissioner by E. A. Cook, addressed to the New York Trust Company, trustee, Erard Matthiessen trust.

The MEMBER. It will be marked "Respondent's Exhibit G", for identification.

(The document so identified was thereupon marked "Respondent's Exhibit G", for identification.)

Mr. FULLERTON. The respondent offers a letter dated April 29, 1927, from C. R. Nash, assistant to the commissioner to New York Trust Company, trustee for Erard Matthiessen.

The MEMBER. It will be marked "Respondent's Exhibit H", for identification.

(The document so identified was thereupon marked "Respondent's Exhibit H", for identification.)

Mr. FULLERTON. Now, there was a small stipulation, but it should wait until after these are disposed of.

The MEMBER. Let us dispose of these now. Now, these first two exhibits—you have them marked as "Exhibit A and B." Is that right, Mr. Clerk?

The CLERK. The revenue agent's report is marked "A"; I understand that is in error.

39 The MEMBER. No; that was not in error; none of them have been admitted; you have two marked as "Exhibits A and B."

The CLERK. That is correct.

The MEMBER. The other exhibits from C to H, inclusive, have been marked for identification?

The CLERK. That is correct.

The MEMBER. We will have the objection.

Mr. MANNIX. Petitioner objects to the introduction or admission in evidence of all of the exhibits thus far offered by the respondent on the ground that such exhibits are incompetent, irrelevant, and immaterial to the issue involved. I understand that they are offered by the respondent for the purpose of meeting the jurisdictional question raised by the petition.

It is the petitioner's contention that the law requires the sending by the commissioner of a registered notice of deficiency to the taxpayer, which notice of deficiency must be addressed to the taxpayer against whom the deficiency is asserted by the commissioner.

We contend that the alleged 60-day letter which has heretofore been introduced in evidence by the petitioner is not addressed to the New York Trust Company as trustee, but is addressed to Erard Matthiessen, a beneficiary of the trust hereinbefore referred to; therefore the correspondence between the trust company and the commissioner, or the reports made by the revenue agent prior to the issuance of the 60-day letter, have no bearing at all on whether or not

a valid 60-day letter was issued, or a valid notice of deficiency was issued in accordance with the statute; I also object to the admissibility in evidence of the letter dated April 29, 1927—

40 The MEMBER. What exhibit is that?

Mr. MANNIX. Exhibit H of respondent—for the reason—for the same reasons as stated with respect to the other exhibits and for the additional reason that said exhibit is a letter dated subsequent to the issuance of the sixty-day letter and is therefore incompetent, irrelevant, and immaterial to the issue involved.

The MEMBER. But you waive the objection that these are copies instead of originals?

Mr. MANNIX. I do.

The MEMBER. You are willing that these copies shall be accepted in lieu of the originals?

Mr. MANNIX. I do.

The MEMBER. To be treated as originals, but subject to all of your other objections.

Mr. MANNIX. Yes, sir.

The MEMBER. What have you to say, Mr. Fullerton?

Mr. FULLERTON. The exhibits introduced show the facts about in this manner:

That the revenue agent made a report on the New York Trust Company as trustee for Erard Matthiessen, and that a copy of that report was sent to the New York Trust Company by letter of transmittal addressed to the New York Trust Company as trustee; that they filed a protest as the New York Trust Company, trustee; to the recommendation of the revenue agent on that letter, and in that letter the New York Trust Company asked for—well, I think that covers it.

After that protest a letter, a thirty-day letter, dated February 8, 1927, issued and by error of the bureau it was entitled "Erard Matthiessen, care of New York Trust Company, trustee",

41 instead of being, as it should have been, "Erard Matthiessen trust, New York Trust Company, trustee"; in other words, the word "trust" was omitted after the name of the beneficiary, and the symbol "in care of" was added in front of the name of the trustee, where it should not have been added, and then, after the issuance of that letter of February 8, 1927, the New York Trust Company as trustee asked for a conference in regard to the matter, and counsel and I will stipulate shortly that such a conference was had and that the representative of the New York Trust Company, trustee, was present at that conference; the letter which postponed the conference and set the date of the conference from March 7, 1927, was addressed to New York Trust Company, trustee; but when the deficiency letter of March 12, 1927, was issued, the same error occurred which had occurred in the letter of February 8th, the deficiency letter being entitled "Erard Matthiessen, % New York Trust Company, trustee", the deficiency was the same deficiency which had been discussed as the petitioner's deficiency throughout the whole matter before the bureau; then on April 29th this last letter issued, which was a ruling on

the application of section 206 of the revenue act of 1921, and was supplemental to the deficiency letter—a ruling made at the request of the taxpayer, and that letter was addressed to the New York Trust Company, trustee.

In the light of all of the record and the correspondence the respondent agrees that there was no mistake in the minds of anyone in this matter that the deficiency was being proposed against the fiduciary and not against the beneficiary in this respect, and regarding the admissibility of these exhibits I would call attention of the Board in the case of Wilkins vs. Lang (9 B.T.A., page 1127), in which a very similar situation occurred; all through the record they had discussed the year 1920, but by a clerical error the year 1919 was the year appearing in the deficiency letter, and the Board held that it was merely a technical error—that nobody was injured and that no one was under any mistake as to whether or not it was the year 1919 or the year 1920, but that the Board had jurisdiction. It is for this reason that I believe that the record in this case is admissible to show what that error was.

42

Mr. MANNIX. May I say a word?

The MEMBER. Yes, sir.

Mr. MANNIX. I may call the court's attention first to the statement that the error alleged to have been committed is the omission from the letter, after the name Mr. Erard Matthiessen, the word "trust"—if that be the error as claimed; even in those circumstances this deficiency letter would be invalid for the reason that a trust is not a taxable person. If any attempt was made to determine a deficiency against the trustee, the notice of deficiency should have been addressed to the trustee, and not to the trust fund, which is not a taxable entity.

I may also call your attention, if Your Honor please, to numerous decisions of the Board, which I will be glad to cover in a memorandum, referring to the fact that the law requires that a notice of deficiency must be addressed to the taxpayer; if a notice of deficiency is not addressed to the taxpayer, the Board has no jurisdiction to render a deficiency assessment against that taxpayer, regardless of who files the petition.

43

Therefore the issue involved in this proceeding with respect to the jurisdictional point is whether or not a deficiency notice in compliance with the statute was addressed to the New York Trust Company as trustee on this trust, or whether deficiency notice was addressed to Mr. Erard Matthiessen, an individual beneficiary of the trust.

With respect to the case cited by Mr. Fullerton it appears from his statement that a deficiency notice was properly addressed to the taxpayer in that proceeding, but that a mistake was made in the deficiency letter with respect to the amount of the deficiency, or with respect to the nature of the deficiency; but the board nevertheless had jurisdiction with respect to that particular petitioner and tax-

payer, because a valid notice of deficiency had been sent and addressed to that taxpayer.

I might also call Your Honor's attention to the letter itself, dated March 12, 1927, which is addressed to Mr. Erard Matthiessen, % New York Trust Company, trustee, 100 Broadway, New York, New York. The first word in the letter is "Sir", which purports to be the address used to an individual, and not "sirs."

They refer in the letter to a previous letter dated February 8, 1927, which letter is one of the exhibits of the respondent, and that letter is addressed to Mr. Erard Matthiessen. Further down
44 in the last paragraph they refer to form A, enclosed as an enclosure in the letter, which is part of and attached to respondent's exhibit, being the deficiency letter. That form is headed "In re Mr. Erard Matthiessen"; on the statement attached to the second page of the deficiency letter the paragraph—the statement is addressed "In re Mr. Erard Matthiessen, % New York Trust Company, trustee", and the first paragraph reads:

"Under date of February 8, 1927, you were advised";

the most important piece of evidence in the letter in our favor, however, is contained in the second paragraph of that statement, which reads as follows:

"The deficiency in tax of $238,275.95 resulted from the adjustment of income from sale of 6,000 shares of Corn Products Refining Company stock, assigned by Conrad H. Matthiessen to the New York Trust Company, as trustee, for your benefit."

Obviously that letter is addressed to Erard Matthiessen, for whose benefit that stock was assigned in the trust.

Further down in the fourth paragraph is a reference to the value of the stock at the time it was transferred to the trustee in 1921, thus referring to the trustee as a third party. It does not say "transferred to you" in 1921, which would be the natural way the statement would be phrased if this letter and statement were addressed to the trustee.

Having all of those things in mind, we contend that the Board is without jurisdiction to enter a deficiency against the trustee.
45 Mr. FULLERTON. May I correct counsel's statement in the one particular? I said that the errors on the deficiency letter was not only the omission of the word "trust" but also the adding of the symbol "%" before the words "New York Trust Company."

The MEMBER. Exhibits A and B and Exhibits C and F, inclusive, which are marked for identification, as offered by counsel for the respondent, will be received in evidence, subject to the objections by counsel for the petitioner.

Mr. MANNIX. May I have an exception of Your Honor's ruling?

The MEMBER. An exception will be granted if the ruling is adverse.

Mr. FULLERTON. Pardon me, but did that dispose of Exhibit G?

The MEMBER. That includes A, B, C, D, E, F, G, and H.

Mr. FULLERTON. I beg your pardon; I misunderstood; I thought you meant to exclude Exhibit H.

The MEMBER. No; I think I said to "H", inclusive.

Mr. FULLERTON. I misunderstood; I beg your pardon.

The MEMBER. But all of these exhibits now offered by counsel for the respondent will be received subject to the objection of counsel for the petitioner, and in the event of an adverse final ruling an exception will be granted, and these exhibits that have now been marked for identification will be marked as exhibits, Mr. Clerk.

(The documents which had been previously marked for identification as respondent's Exhibits A, B, C, D, E, F, G, and H, respectively, were thereupon received in evidence and marked, respectively, "Respondent's Exhibits A, B, C, D, E, F, G, and H", and are made a part of this record.)

46

The MEMBER. Is there anything further to offer, Mr. Fullerton?

Stipulation

Mr. FULLERTON. It is stipulated and agreed by respective counsel that on March 7, 1927, the representative of the petitioner held a conference concerning the tax here involved with the Bureau of Internal Revenue.

The MEMBER. You have heard the stipulation?

Mr. MANNIX. That is satisfactory.

The MEMBER. The stipulation of the parties will be accepted.

Mr. FULLERTON. That is all for the respondent.

Mr. MANNIX. That is all the evidence for the petitioner.

The MEMBER. Both sides rest?

Mr. FULLERTON. Yes, sir.

The MEMBER. I wish briefs from both sides on this case. When may be have yours, Mr. Fullerton?

Mr. FULLERTON. May I have until the 5th of January 1930?

Mr. MANNIX. May I have the same period of time?

The MEMBER. Yes; now, then, briefs will be submitted by both parties on or before January 5, 1930; they will be submitted simultaneously; that is, they will not be exchanged.

47

Mr. MANNIX. If we want to submit our brief directly, we can submit our brief to the board directly before the 5th of January, but not give it to counsel for the respondent.

The MEMBER. You are not obliged to exchange briefs; they are to be submitted simultaneously to the board by January 5.

Mr. MANNIX. May I express my thanks and appreciation of Your Honor's waiting until we finished this matter?

The MEMBER. That is all right; this case is closed now waiting to receive the briefs, and this division will recess until 2:30.

(The above and foregoing is all of the proceedings had and testimony heard on the hearing of the above cause; whereupon at 1:25 o'clock p.m. the hearing in the above matter was concluded.)

Form 1040

U. S. Internal Revenue

(Auditor's Stamp)

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES OF MORE THAN $5,000

OR JOINT RETURNS OF HUSBAND AND WIFE IF COMBINED NET INCOME EXCEEDS $ 00

For Calendar Year 1922

For fiscal period beginning ....., 1921, and ended ....., 1922

File This Return Not Later Than the 15th Day of the Third Month Following the Close of the Taxable Period

(PRINT NAME AND ADDRESS PLAINLY BELOW)

[illegible] AS TRUSTEE FOR

EARNO MATTHIESEN (A MINOR)

OF INDENTURE DATED DEC 27, 1921.

100 BROADWAY

(Street and number, or rural route)

NEW YORK CITY

(Post office) (County) (State)

Do Not Write in These Spaces

SERIAL NUMBER

32093

DIST. CODE 23

DIST. SYMBOL

$ 2717-

Examined by

(Cashier's Stamp)

Ck. Check M. O. Cert. of Int.

BEC A

ASSESSMENT

Tax - - - 238275 90

Penalty - -

Interest - 105476.26

Total 343752.21

Date Ck or M.O. Rec'd 5-25-26

Audited by ARNOLD PAUL

Unit No. PA 3

LIST ..... DEC 1 1920

Page 0 Line 0

OCCUPATION, PROFESSION, OR KIND OF BUSINESS .....

1. Are you a citizen or resident of the United States? Yes

2. If you filed a return for 1921, to what Collector's office was it sent? .....

3. Is this a joint return of husband and wife, or of a person and a minor child?

4. If not, is a separate return being filed by your husband or wife? .....

If so, state: (a) Name and address entered at head of that return .....

5. Were you married and living with husband or wife on the last day of your taxable period? No

6. If not, were you on the last day of your taxable period supporting and living in your household who are closely related to you by blood, marriage, or adoption?

7. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable period? .....

INCOME

	Amount received	Expenses paid (Deductible)
1. Salaries, Wages, Commissions, etc. (State name and address of person from whom received.)	$	$
2. Income from Business or Profession. (From Schedule A)		
3. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds	3370 14	
4. Income from Partnerships, Fiduciaries, etc. (State name and address of partnership, etc.)		
5. Rents and Royalties. (From Schedule B)		
6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)	1032 50	
7. Dividends on Stock of Domestic Corporations	27201 25	

3. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds		3370 14
4. Income from Partnerships, Fiduciaries, etc. (State name and address of partnership, etc.)		
5. Rents and Royalties. (From Schedule B)		
6. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)		1032 50
7. Dividends on Stock of Domestic Corporations		27201 25
8. Taxable Interest on Liberty Bonds, etc. (From Schedule E)		
9. Other Income (including dividends received on stock of foreign corporations). (State nature of income.)		
(a)		
(b)		
(c)		
10. TOTAL INCOME IN ITEMS 1 TO 9		29508 87
DEDUCTIONS		
11. Losses by Fire, Storm, etc. (Explain in Schedule F)		
12. Interest Paid Accrued int. to purchase mortgage. taxable Bonds.	55 83	227 23 / 351 83
13. Taxes Paid Transfer Tax.		160 X
14. Bad Debts. (Explain in Schedule G)		
15. Contributions. (Explain in Schedule G)		
16. Other Deductions Authorized by Law. (Explain in Schedule G) Amortization Commissions paid The NY Trust Co. coll. income.		82 82 / 287 68 / 1119 11
17. TOTAL DEDUCTIONS IN ITEMS 11 TO 16		1620 16 X
18. NET INCOME (Item 10 minus Item 17)		27888 73

COMPUTATION OF TAX

19. Net Income (Item 18 above)		27888 73	27. Normal Tax 4% of Item 26)	- 0 -
20. Less: Dividends (Item 7 above)	27201 25		28. Normal Tax 8% of Item 26)	- 0 -
21. Taxable Interest on Liberty Bonds etc. (Item 8 above)	- 0 -		29. Surtax on Item 19 (see Instruction 29)	1187 76
22. Personal Exemption and Credit for Dependents	1000		30. Tax on Capital Net Gain (12½% of column 9, Schedule D) (see Instruction 6)	10923 13
23. TOTAL OF ITEMS 20, 21, AND 22		28201 25	31. Total Tax 12½% of Net Income 11687 73	14092 21
24. Balance (Item 19 minus Item 23)		- 0 -	32. Less: Income Tax paid at source	17 50
25. Amount taxable at 4% (not over $4,000)		- 0 -	33. Income and profits taxes paid to foreign countries or possessions of the U. S. (attach Form 1116)	17 50
26. Balance taxable at 8% (Item 24 minus Item 25)		- 0 -	34. Balance of Tax (Item 31 minus Items 32 and 33)	14074 71

In computing tax for a fiscal year, see Article 1624 of Regulations 62

Checks and drafts will be accepted only if payable

k1

Petitioner's Exhibit No. 3

25

48

SCHEDULE A.—INCOME FROM BUSINESS OR PROFESSION. (See Instruction 2.)

1. Total income from business or profession ..... $

Cost of Goods Sold:

2. Labor ..... $
3. Material and supplies .....
4. Merchandise bought for sale .....
5. Other costs (list principal items and amounts below or on separate sheet) .....
6. Plus inventory at beginning of year .....
7. TOTAL (Lines 2 to 6, inclusive) ..... $
8. Less inventory at end of year .....
9. NET COST OF GOODS SOLD (Line 7 minus Line 8) ..... $

State amount of salary to self included in Item 10 ..... $

Explanation of deductions claimed on Lines 5, 14, and 16 .....

OTHER BUSINESS DEDUCTIONS:

10. Salaries and wages not reported as "Labor" on line 2 (see Instruction 1) ..... $
11. Rent on business property in which taxpayer has no equity .....
12. Interest on business indebtedness to others .....
13. Taxes on business and business property .....
14. Repairs, wear and tear, obsolescence, depletion, and property losses (explain below) .....
15. Bad debts arising from sales or professional services .....
16. Other expenses (list principal items and amounts below or on separate sheet) .....
17. TOTAL (Lines 10 to 16, inclusive) ..... $
18. TOTAL DEDUCTIONS (Line 9 plus Line 17) ..... $
19. NET INCOME (Line 1 minus Line 18) (Enter as Item 2) ..... $

SCHEDULE B.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 5.)

1. KIND OF PROPERTY.	2. AMOUNT RECEIVED.	3. COST, OR VALUE MARCH 1, 1913.	4. DEPRECIATION AND DEPLETION.	5. REPAIRS.	6. OTHER EXPENSES.	7. NET INCOME (Enter as Item 3).
	$	$	$	$	$	$

State estimated life of property, and depreciation previously taken .....

SCHEDULE C.—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6.)

1. KIND OF PROPERTY.	2. DATE ACQUIRED.	3. AMOUNT RECEIVED.	4. DEPRECIATION.	5. COST.	6. VALUE MARCH 1, 1913.	7. SUBSEQUENT IMPROVEMENTS.	8. NET [illegible] (Enter as Item 4).
Liberty Loan Int. Exp. Fds.	1922	$ 21005 —	$ — 0 —	$ 20057 50	$ — 0 —	$	$ 1022 50

If not acquired by purchase, state how acquired .....

SCHEDULE D.—CAPITAL NET GAIN FROM SALE OF ASSETS HELD FOR MORE THAN TWO YEARS. (Optional, see Instruction 6.)

1. KIND OF PROPERTY.	2. DATE ACQUIRED.	3. DATE SOLD.	4. AMOUNT RECEIVED.	5. DEPRECIATION.	6. COST.	7. VALUE MARCH 1, 1913.	8. SUBSEQUENT IMPROVEMENTS, AND CAPITAL DEDUCTIONS.	9. NET GAIN (Enter Tax of 12½%, as Item 30)
U. S. Liberty Loan Conv. 4¼%	3/15/22	1922	$ 608385 —	$ — 0 —	$ 576000 —	$ 72750 —	$	$ 17385 —

If not acquired by purchase, state how acquired .....

[illegible] (See Instruction 8.)

If not acquired by purchase, state how acquired

SCHEDULE D.—CAPITAL NET GAIN FROM SALE OF ASSETS HELD FOR MORE THAN TWO YEARS. (Optional, see Instruction 6.)

1. Kind of Property.	2. Date Acquired	3. Date Sold.	4. Amount Received.	5. Depreciation.	6. Cost.	7. Value March 1, 1913.	8. Subsequent Improvements and Capital Deductions.	9. Net Gain (Enter Tax of 12½% as Item 30)
[illegible]	[illegible]	1922	$608 926 —	$ — 0 —	$ 576 000 —	$ 72760 —	$	$ 27 226

If not acquired by purchase, state how acquired

SCHEDULE E.—TAXABLE INTEREST ON LIBERTY BONDS, ETC. (See Instruction 8.)

1. Obligations of the United States Issued Since September 1, 1917. (Wholly exempt from normal tax, but subject to surtax as to excess over exemptions specified.)	Exemptions. (Aggregate Principal Amount.) 2. $30,000.	3. $[illegible].	4. $[illegible].	5. Principal Amount in Excess of Exemptions Specified in Columns 2, 3, and 4.	6. Interest on Principal Amount in Excess of Exemptions.
(a) First Liberty Loan Second Converted 4¼% Bonds		$	$	$	$
(b) First and Second 4's and First, Second, Third, and Fourth 4¼'s	NONE				
(c) Treasury 4½% Bonds, Treasury Certificates, Treasury and War Savings Certificates	NONE	NONE			
(d) Victory Liberty Loan 4¼% Notes, and Treasury Notes	NONE	NONE	NONE		
(e) Total Taxable Interest (*If you have bought or sold during the year attach statement showing dealings by periods*). (Enter as Item 8)					$

SCHEDULE F.—EXPLANATION OF LOSSES BY FIRE, STORM, ETC. (See Instruction 11.)

1. Kind of Property.	2. Cost, or Value March 1, 1913.	3. Depreciation Previously Taken.	4. Salvage Value.	5. Insurance.	6. Net Loss. (Enter as Item 11).
	$	$	$	$	$

SCHEDULE G.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 15, AND 16.

AFFIDAVIT.

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and, to the best of my knowledge and belief, is a true and complete return made in good faith, for the taxable period as stated, pursuant to the Revenue Act of 1921 and the Regulations issued under authority thereof.

(If return is made by agent, the evidence therefor must be stated on this line.)

Sworn to and subscribed before me this 5th day of March, 1923.

[illegible]
(Signature of individual or agent)

[illegible]
(Official character administering oath.) (Title.) (Address of individual or agent.)

(An amended return must be plainly marked "Amended" across face of return.)

17

[illegible]

51 *Petitioner's Exhibit No. 3*

THE NEW YORK TRUST COMPANY,
100 Broadway, New York, March 15, 1923.

(Endorsed:) Collector of internal revenue, 2d Dist., N.Y. Received Mar. 15, 1923.

Honorable FRANK K. BOWERS,
Collector of Internal Revenue,
Customhouse, New York City.

DEAR SIR: We enclose individual income-tax return for the year 1922 filed by the New York Trust Company as trustee for Erard Matthiessen (a minor).

The total tax shown on this return is $14,391.71.

We also enclose our cheque to your order for $3,597.92 to pay the first quarterly installment due when the return is filed.

This return is hereby filed for the reason that the securities sold in accordance with Schedule D at a market value of $577,500, when received by the trustee on December 24, 1921. Such securities were sold for $603,385, thereby deriving a profit of $25,885.

The trustee respectfully protests the requirement that the cost of the securities to the donor be used as a basis for determining the profit derived on the sale of the securities by the trustee.

Yours very truly,

G. B. PAULL.
Tax Department.

MDT/BM. Enclosures.

52 The securities sold in accordance with Schedule D had a market value of $577,500.00, when received by the trustee on December 24, 1921. Such securities were sold for $603,385.00, thereby deriving a profit of $25,885.00. The trustee respectfully protests the requirements that the cost of the securities to the donor be used as a basis for determining the profit derived on the sale of the securities by the trustee.

Respondent's Exhibit A

(Endorsed:) U.S. Board of Tax Appeals, Div. 16, Docket 28250. Admitted in evidence Dec. 9, 1929.

Office of supervising internal revenue agent, New York Division,
Customhouse Building

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
New York, N.Y., May 22, 1926.

In re New York Trust Co., as trustee for Erard Matthiessen (a minor) of indenture dated Dec. 24, 1921, 100 Broadway, New York, N.Y.

Examining officer	Examination commenced	Examination completed
A. J. Auerbach	May 12, 1926	May 22, 1926

Supervising revenue agent, customhouse, New York, N.Y.

An examination of the books and records of the above-
53 named taxpayer for the years 1922 and 1923, inclusive, disclosed the following in connection with its income and liability:

53 *Summary*

Years	Additional tax
1922	$238,275.95
1923	None
Total	238,275.95

Kind of business: Investments, receiving interest and dividends on stocks and bonds.

Authority for examination: Original return for 1922.

Other remarks: All items in connection with this examination were discussed with Mr. Thompson, and Mr. G. B. Paull, of the New York Trust Co., the latter, on behalf of the New York Trust Co., signified an intention to protest against additional tax recommended.

The New York Trust Co. filed a fiduciary report for 1923 because Mr. Erard Matthiessen became of age in 1923, and filed a 1040. An examination of the fiduciary return filed for 1923 showed all items of income and deduction correctly reported; examination of fiduciary for 1923 made from retained copy.

This examination was made in this office and report submitted in accordance with authority granted by the bureau.

(Signed) AARON J. AUERBACH,
Internal Revenue Agent.

Index: Pages covered, 4; schedules 1 to 2.

Encl. orig. return for 1922.

DC.

N.Y. Trust Co. as trustee for Erard Matthiessen (a minor)

54 *Schedule 1*

Block adjustments	Return	Additions to income	Year 1922, corrected
3. Interest	$3,340.14		$3,340.14
6. Sale of securities	(1,032.50)	$462,010.00	460,977.50
7. Dividends	27,201.25		27,201.25
10. Total	29,508.89	462,010.00	491,518.89
12. Interest	1,088.06		1,088.06
13. Taxes	160.00		160.00
16. Other deductions	372.10		372.10
17. Total	1,620.16		1,620.16
18. Net income	27,888.73	462,010.00	489,898.73

Schedule 1-A

All items of income and deduction were found to be correct with the following exception: The taxpayer originally reported as a capital net gain, taxable at 12½% in accordance with section 206 of the

1921 act, $87,385.00, representing gain on sale of 6,000 shares of common stock issued by the Corn Products Refining Co. The taxpayer set up the following schedule in connection with this transaction:

Kind of property	Date acquired	Amount recd.	Cost	3/1/13 value	Net gain
6,000 shares Corn Products Refining Co. common.	Acquired by grantor of trust prior to 3/1/13.	$603,385	$516,000	$72,750	$87,385

On December 24, 1921, the New York Trust Co. received as trustee, in addition to other property, 6,000 shares of Corn Products Refining Co. common stock, from Conrad H. Matthiessen, who had executed an irrevocable trust for the benefit of the latter's son Erard Mat-
55 thiessen (a minor), naming the New York Trust Co. as trustee.

The latter sold 6,000 shares of Corn Products Refining Co. common stock in 1922 for $603,385, and in order to prepare the 1922 Federal income-tax report as trustee for the minor, in accordance with the provisions of the 1921 Act, communicated with Mr. Conrad H. Matthiessen with a view to ascertaining the cost of the 6,000 shares in question to him; in a letter dated Nov. 30, 1922, to Mr. Morse, an officer of the New York Trust Co., Mr. Conrad H. Matthiessen, in part, replied as follows:

(Explanation of items)

"Regarding the income-tax return for my son Erard's trust fund, the Corn Products common will have to be figured on the cost basis to me of 86."

The New York Trust Co. accordingly inserted, as cost, $516,000 (6,000 shares, @ $86 per share). As a result of several conferences with Mr. Thompson and Mr. G. B. Paull, of the New York Trust Co., it was admitted that the latter is not in a position at the present time to be able to prove the correctness of $86 per share as cost to Mr. Conrad H. Matthiessen; also that because of the inability on the part of the Trust Co. to get any information from Mr. C. H. Matthiessen pertinent to the cost of the stock in question, the likelihood of ever establishing and proving the stated cost is extremely remote.

The Trust Co. offered for my inspection a copy of a brief filed March 19, 1924, in re proposed additional assessment against Conrad H. Matthiessen, % New York Trust Co., New York,
56 N.Y., in connection with an examination of returns for 1918, 1919, 1920, as shown in revenue agent's report dated July 31, 1923, attached to supervising internal revenue agent at New York City's letter dated October 30, 1923.

From this brief I have extracted certain data which I am herewith submitting for purposes of substantiating the basic figure of cost of 6,000 shares in question, which I have used in arriving

at the taxable net profit incident to the sale of 6,000 shares in question.

The Corn Products Refining Co. was formed in 1906 by reorganization of the Corn Products Co.; the latter company was organized Feb. 6, 1902, as holding company for the Glucose Sugar Refining Co., National Starch Co., Chas. Pope Glucose Co., Illinois Sugar Refining Co.

The Glucose Sugar Refining Co. was organized 1897, and was itself a result of a consolidation of a number of glucose and sugar refining companies, including the Chicago Sugar Refining Co., in which the father and uncle of Mr. Conrad H. Matthiessen were the principal stockholders.

The Glucose Sugar Refining Co. was promoted by the Matthiessens and others; it is estimated that $3,500,000 common stock was issued as promoters' fees.

On Jan. 29, 1906, Mr. Conrad H. Matthiessen deposited 21,000 shares of Corn Products Co. common stock and received in exchange on April 27, 1906, 14,000 shares of Corn Products Refining Co. common stock, as follows:

Certificates C3868 continuously through C4007, each certificate for 100 shares.

The Financial Chronicle records show that on April 27,
57 1906, Corn Producers Refining Co. common stock sold as low as $23¼ per share and as high as $23⅞ per share, the average being $23 1/16 per share.

The New York Trust Co., amongst other property, received from Mr. C. H. Matthiessen, as part of securities going to make up the aforementioned trust fund for Erard Matthiessen, 6,000 shares Corn Products Refining Co. common stock bearing certificate number C3868 through C3927 for 100 shares each; these certificates were received on April 27, 1906, in exchange for common stock Corn Products Co.

The trust company had certificates C3868 to C3927 transferred, and received, in name of Erard Matthiessen, certificates C41618 to C41677 in exchange; the latter certificates, 100 shares each Corn Products Refining Co. common stock, were sold by the trust company in 1922 for $603,385.00.

Inasmuch as the New York Trust Co. is unable to corroborate and prove as cost to Mr. C. H. Matthiessen $86 per share, and the trust company has definitely proved to the satisfaction of the Commissioner of Internal Revenue a value of $23 1/16 per share on April 27, 1906, to be used as a basis, I have employed the latter figure as the basic cost in arriving at the taxable profit arising out of the sale of the stock in question, this value being greater than the March 1, 1913, value.

In connection with the nature of the profit I have included the entire profit in net income subject to normal and surtaxes, in accordance with IT-1379 Cumulative Bulletin 1-2, July-Dec. 1922, which

states that section 206 of the Revenue Act of 1921 has no
58 application because the securities have not been held by the trustee for a period of two years prior to the sale.

My revised computation of taxable profit arising out of the sale of the 6,000 shares in question is as follows:

Security sold	Date acquired	Amount recd	Basic cost	3/1/13 value	Net gain
6,000 shares Corn Products Refining Co. common.	Acquired by grantor of trust April 27, 1906.	$603,385	$141,375	$72,750	$462,010

Schedule 2

Computation of tax

1922 (ended 12/31/22)

Total net income (see schedule)		$489,898.73
Income subject to surtax		489,898.73
Less:		
Exemption	$1,000.00	
Dividends	27,201.25	
		28,201.25
Income subject to normal tax		461,697.48
Tax, 4% on $4,000	160.00	
Tax, 8% on $457,697.48	36,615.80	
Surtax	215,909.36	
Total tax		252,685.16
Less: Tax withheld at source	17.50	17.50
Total tax assessable		252,667.66
Tax previously assessed		14,391.71
Additional to be assessed		238,275.95

59 Before United States Board of Tax Appeals

Docket No. 28250

THE NEW YORK TRUST COMPANY, AS TRUSTEE UNDER TRUST INDENTURE, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Company, petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Findings of fact and opinion

Promulgated April 10, 1933

1. Under the circumstances herein, held that petitioner has not shown that certain stock was not acquired by gift after December 31, 1920, within the meaning of section 202 (a) (2) of the Revenue Act

of 1921. The basis to be used in determining gain or loss upon the sale thereof by the trustee is the cost of such stock to the grantor.

2. Section 202 (a) (2) of the Revenue Act of 1921 is constitutional. (Taft *v.* Bowers, 278 U.S. 470.)

3. Held, petitioner is not entitled to have its tax computed under section 206 of the Revenue Act of 1921, since the property was not held for more than two years.

60 Russell D. Morrill, Esq., and Henry Mannix, Esq., for the petitioner.

Brooks Fullerton, Esq., for the respondent.

This is a proceeding for the redetermination of a deficiency in income tax for the year 1922 in the amount of $238,275.95.

This Board held that this proceeding should be dismissed for lack of jurisdiction (New York Trust Co., Trustee, 20 B.T.A. 162), and it was dismissed. The United States Circuit Court of Appeals for the Second Circuit reversed the order of the Board (New York Trust Co. *v.* Commissioner, 54 Fed. [2d] 463). Certiorari was denied by the United States Supreme Court (28 U.S. 556). The cause was remanded to the Board for such further proceeding as should be had.

The following errors are alleged: (1) The respondent has erroneously determined petitioner's gross income for the year 1922 in that he has incorrectly computed the profit realized in that year upon the sale of 6,000 shares of the common stock of the Corn Products Refining Company, such profit having been computed by using as a basis the cost of said stock to petitioner's grantor pursuant to the provisions of section 202 (a) (2) of the Revenue Act of 1921, instead of its fair market value on the date it was acquired by petitioner; (2) in so far as section 202 (a) (2) of the Revenue Act of 1921 purports to authorize respondent to tax to petitioner an alleged profit upon the sale of such stock, computed by using as a basis the cost of said stock to petitioner's grantor, said section is un-

61 constitutional and void; (3) in the event the Board finds that section 202 (a) (2) of the Revenue Act of 1921 is constitutional and that the basis used by respondent in computing the profit was correct, then respondent erred in computing the tax upon said profit at the full normal and surtax rates instead of at the rate of 12½ per cent in accordance with section 206 of the Revenue Act of 1921.

Findings of Fact

The petitioner is a corporation, organized under the banking law of the State of New York, and its principal office is at 100 Broadway, New York City.

On April 27, 1906, Conrad Henry Matthiessen acquired 6,000 shares of the common stock of the Corn Products Refining Company at a cost of $141,375, which cost exceeded the value of such shares on March 1, 1913.

By an irrevocable indenture dated December 24, 1921, Conrad Henry Matthiessen transferred the 6,000 shares of common stock of the Corn Products Refining Company to the petitioner in trust to collect the income and dividends therefrom and accumulate the same until such time as his son, Erard A. Matthiessen, should attain the age of 21 years, at which time petitioner was directed to pay over all such accumulated income to such son. Thereafter and until Erard A. Matthiessen should attain the age of 25 years, petitioner was directed to pay the income of the fund to him currently, and upon his reaching such age, to pay over the principal to him. In the event that Erard A. Matthiessen should die before reaching the age of 25 years, it was provided that petitioner should
62 pay over the principal in equal shares to two other sons of the grantor.

On December 24, 1921, the 6,000 shares of common stock of the Corn Products Refining Company had a fair market value of $96.25 per share, or a total fair market value of $577,500.

During the year 1922, the petitioner sold the 6,000 shares of the common stock of the Corn Products Refining Company above referred to, receiving therefor the net amount of $603,385. Petitioner filed a Federal income tax return for the calendar year 1922, wherein it reported a profit of $87,385 on the sale.

In computing the profit realized by petitioner upon this sale, the respondent used as a basis the cost of such stock to Conrad Henry Matthiessen instead of its fair market value as of the date it was acquired by the petitioner. As shown by the notice of deficiency, the respondent treated the transaction whereby Conrad Henry Matthiessen transferred the stock in trust as a gift and computed the profit under article 1562 of Regulations 62, which article deals with property acquired by gift after December 31, 1920.

Erard Matthiessen had not reached the age of 21 during the year 1922.

OPINION

McMahon: We must first determine the proper basis for the computation of gain or loss upon the sale by the petitioner in 1922 of 6,000 shares of common stock of the Corn Products Refining Company which were acquired by petitioner as trustee in 1921.
63 The respondent has held that subdivision (2) of section 202 (a) of the Revenue Act of 1921[1] is here applicable and

[1] SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * *

(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property, as found by the Commissioner as of the date or approximate date at which, according to the best information the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner. * * *

that the proper basis to be used is the cost of such stock to the donor.

The respondent has held that the irrevocable indenture dated December 24, 1921, accomplished a gift of the 6,000 shares of stock in question. There is no evidence to show that it did not accomplish a gift. On the contrary, it appears that Conrad Henry Matthiessen parted with all dominion over the subject matter. A gift may be made by a transfer in trust where, as here, the grantor relinquishes all dominion over the subject matter. Murray Guggenheim (24 B.T.A. 1181), affirmed by the Supreme Court in Burnet v. Guggenheim (53 S.Ct. 369), which reversed the United States Circuit Court of Appeals decision in Guggenheim v. Commissioner (58 Fed. (2d) 188). See also Bok v. McCaughn (42 Fed. (2d) 616). The petitioner, however, contends that subdivision (2) of section 202 (a), in referring to property "acquired by gift after December 31, 1920", means property acquired by the taxpayer, that the trustee is
64 the taxpayer herein involved, and that since the trustee did not acquire the property by gift, but as trustee, subdivision (2) of section 202 (a) does not apply here. This contention is not well founded. In Security Trust Co. et al., Trustees (25 B.T.A. 29, 38), we stated:

"* * * Here the testator actually created the trust by his will. The trust, not the trustees, is the taxpayer. The trustees are only one of the component parts of the taxpayer. They hold legal title to and possession of the property and act for the taxpayer. They never acquired a beneficial interest in the trust property—that goes to the cestuis que trustent, who are also a part of the trust. * * *" Upon the record before us we cannot hold that under subdivision (2) of section 202 (a) the property in question was not "acquired by gift after December 31, 1920." This view is, we believe, in accord with the purpose of the section of the revenue act in question.

The Ways and Means Committee report and the Finance Committee report upon the Revenue Act of 1921 contain the following discussion of subdivision (2) of section 202 (a):

"* * * An essential change, however, is made in the treatment of property acquired by gift. No explicit rule is found in the present statute for determining the gain derived or the loss sustained on the sale of property acquired by gift; but the Bureau of Internal Revenue holds that under existing law the proper basis is the fair market price or value of such property at the time of its acquisition. This rule has been the source of serious evasion and abuse.
65 Taxpayers having property which has come to be worth far more than it cost to give such property to wives or relatives by whom it may be sold without realizing a gain unless the selling price is in excess of the value of the property at the time of the gift. The proposed bill in paragraph (2) of subdivision (a) provides a new and just rule, namely, that in the case of property acquired by gift after December 31, 1920, the basis for computing gain or loss shall be the same as the property would have in the hands of

the donor or the last preceding owner by whom it was not acquired by gift. * * *"

In Rice *v.* Eisner (16 Fed. (2d) 358) the following appears:

"The act of 1921 was apparently passed for quite another reason, that is, in the future to prevent donors from escaping the high taxes prevailing by giving property to their wives or children. As the latter would be allowed on any subsequent sales to subtract the value of the gift when they received it, and as a gift was not a sale as regards the donor, all increment escaped taxation which had accrued during the ownership of the donors. As to earlier gifts the rule remained as it had been in practice applied before the act of 1921 was passed."

Francis Francis, Guardian (15 B.T.A. 1332), cited by petitioner, is distinguishable from the instant proceeding. In that case there was clearly no gift of the property involved after December 31, 1920, so as to render section 202 (a) (2) of the Revenue Act of 1921 applicable. The taxpayers there acquired the property "pur-
66 suant to a vested legal right and this right had been theirs since long before the adoption of the Sixteenth Amendment in 1913."

Bankers Trust Co., Trustee (24 B.T.A. 10), cited by petitioner, is also distinguishable. There the beneficiaries, under the indenture, "took absolutely nothing until the grantor's death, and even then would receive nothing in case their deaths occurred prior to his. The final reversionary interest was to the grantor's estate." We there held that there was no gift inter vivos.

Subdivision (2) of section 202 (a) of the Revenue Act of 1921 provides that the basis of the property shall be the same as that which it would have in the hands of the donor. The stock herein involved was acquired by the donor in 1906 at a cost of $141,375, which amount exceeded the value of such stock on March 1, 1913. Under subdivision (b) of section 202 of the Revenue Act of 1921, set forth in the margin,[2] the basis in the donor's hands would be the
67 cost to him. We hold, therefore, that the basis to be used in the computation of gain derived by the petitioner upon the sale of the stock in question is $141,375.

The contention of the petitioner that section 202 (a) (2) is unconstitutional is without merit. (Taft *v.* Bowers, 278 U.S. 470, and Cooper *v.* United States, 280 U.S. 409.)

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[2] SEC. 202. (b) The basis for ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, acquired before March 1, 1913, shall be the same as that provided by subdivision (a); but—

(1) If its fair market price or value as of March 1, 1913, is in excess of such basis, the gain to be included in the gross income shall be the excess of the amount realized therefor over such fair market price or value;

(2) If its fair market price or value as of March 1, 1913, is lower than such basis, the deductible loss is the excess of the fair market price or value as of March 1, 1913, over the amount realized therefor; and

(3) If the amount realized therefor is more than such basis but not more than its fair market price or values as of March 1, 1913, or less than such basis but not less than such fair market price or value, no gain shall be included in and no loss deducted from the gross income.

The petitioner also contends that in the event the Board finds that section 202 (a) (2) of the Revenue Act of 1921 is constitutional and that the basis used by respondent in computing the profit is correct, then respondent erred in computing the tax upon such property at the full normal and surtax rates instead of at the rate of 12½ per cent in accordance with section 206 of the Revenue Act of 1921.[3] However, following the decisions in Magdaline McKinney (16 B.T.A. 804); William Kempton Johnson (17 B.T.A. 611); affd., Johnson *v.* Commissioner (52 Fed. (2d) 726); and Sydney M. Shoenberg (19 B.T.A. 399); affd., Shoenberg *v.* Burnet (55 Fed. (2d) 543), we hold that petitioner is not entitled to have its tax computed under section 206 of the Revenue Act of 1921, since the property in question was not held by the taxpayer for more than two years.

Reviewed by the Board.

Decision will be entered for the respondent.

68 Before United States Board of Tax Appeals, Washington

Docket No. 28250

THE NEW YORK TRUST COMPANY, AS TRUSTEE UNDER TRUST INDENTURE, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Company, company petitioner.

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision.

Pursuant to the determination of the Board, as set forth in its report promulgated April 10, 1933, it is

Ordered and Decided: That there is a deficiency of $238,275.95 for the year 1922.

[SEAL] (Signed) STEPHEN J. McMAHON,
Member.

Enter:

Entered Apr. 11, 1933.

---

[3] SEC. 206. (a) That for the purpose of this title:

* * * * * * *

(6) The term "capital assets" as used in this section means property acquired and held by the taxpayer for profit or investment for more than two years (whether or not connected with his trade or business). * * *

(b) In the case of any taxpayer (other than a corporation) who for any taxable year derives a capital net gain, there shall (at the election of the taxpayer) be levied, collected, and paid, in lieu of the taxes imposed by sections 210 and 211 of this title, a tax determined as follows:

A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner provided in sections 210 and 211, and the total tax shall be this amount plus 12½ per centum of the capital net gain; but if the taxpayer elects to be taxed under this section the total tax shall in no such case be less than 12½ per centum of the total net income. * * *

69 Before United States Board of Tax Appeals

[Title omitted.]

Petition for review

Filed June 28, 1933

To the honorable judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes petitioner-petitioner on review by its attorney, Russell D. Morrill, and respectfully shows:

I

Petitioner on review (hereinafter referred to as the "Taxpayer") is a corporation, organized under the banking law of the State of New York, and its principal office is at 100 Broadway, New
70 York City, New York. The Taxpayer, as trustee, etc., duly filed its Federal income-tax return for the year 1922 with the collector of internal revenue for the second district of New York, whose office is located in the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

Respondent on review (hereinafter referred to as the "Commissioner") is the duly authorized and acting Commissioner of Internal Revenue, holding his office by virtue of the laws of the United States.

II

The controversy relates to an alleged deficiency of $238,275.95 in income tax for the calendar year 1922, determined by the Commissioner. The issues are: (a) the proper cost basis of certain stock sold by the Taxpayer in 1922, and (b) in the alternative, whether profit derived from the sale of said stock is taxable at the normal and surtax rates, or represents a capital profit derived from property "held" for more than two years and is taxable at the capital gain rate of 12½%.

The facts are:

On April 27, 1906, Conrad Henry Matthiessen acquired 6,000 shares of the common stock of the Corn Products Refining Company at a cost of $141,375, which cost exceeded the value of such shares on March 1, 1913.

By an irrevocable indenture dated December 24, 1921, Conrad Henry Matthiessen transferred the 6,000 shares of common stock of the Corn Products Refining Company to the Taxpayer
71 in trust to collect the income and dividends therefrom and accumulate the same until such time as his son, Erard A. Matthiessen, should attain the age of 21 years, at which time the Taxpayer was directed to pay over all such accumulated income to such son. Thereafter and until Erard A. Matthiessen should attain the

age of 25 years, the Taxpayer was directed to pay the income of the fund to him currently, and upon his reaching such age, to pay over the principal to him. In the event that Erard A. Matthiessen should die before reaching the age of 25 years, it was provided that the Taxpayer should pay over the principal in equal shares to two other sons of the grantor. Erard A. Matthiessen had not reached the age of 21 during the year 1922.

On December 24, 1921, the 6,000 shares of common stock of the Corn Products Refining Company had a fair market value of $96.25 per share, or a total fair market value of $577,500.

During the year 1922, the Taxpayer sold the 6,000 shares of the common stock of the Corn Products Refining Company above referred to, receiving therefor the net amount of $603,385. The Taxpayer filed a Federal income-tax return for the calendar year 1922, wherein it reported a profit of $87,385 on the sale.

Upon review, in computing the profit realized by the Taxpayer upon this sale, the Commissioner used as a basis the cost of such stock to Conrad Henry Matthiessen, or $141,375, relying on section 202 (a) (2) of the Revenue Act of 1921 which requires a donee to use the same basis as the donor, and computed the tax at the
72 normal and surtax rates. Such adjustment by the Commissioner produced the alleged deficiency of $238,275.95. The Board of Tax Appeals sustained the Commissioner.

The Taxpayer contends that in determining its cost basis, section 202 (a) (2) of the 1921 Revenue Act is not applicable, and that its cost basis is value of the stock at the date acquired, or $577,500. In the alternative, the Taxpayer contends that if its cost basis is the same as that of Conrad Henry Matthiessen then it "held" such stock, within the meaning of section 206 (a) (6) of the 1921 Revenue Act, for more than two years, and, therefore, the profit derived from its sale is subject to tax at the capital gain rate of 12½%.

III

The assignments of error are:

1. The Board of Tax Appeals erred in finding and holding that section 202 (a) (2) of the Revenue Act of 1921 is applicable, and that the Taxpayer's cost basis for the 6,000 shares of common stock of Corn Products Refining Company acquired from Conrad Henry Matthiessen upon the creation of the trust was the same as the cost basis thereof to said Conrad Henry Matthiessen.

2. The Board of Tax Appeals erred in failing to find and hold that the Taxpayer's cost basis for said stock was value at the time acquired by the Taxpayer, or $577,500.

3. The Board of Tax Appeals erred in finding and holding
73 that profit derived by the Taxpayer from the sale of said stock was taxable at normal and surtax rates, and was not taxable at the capital gain rate of 12½%.

4. The Board of Tax Appeals erred in failing to find and hold that the Taxpayer had "held" such stock for more than two years,

within the meaning of section 206 (a), (6) of the 1921 Revenue Act, and that profit derived from the sale thereof was taxable at the capital gain rate of 12½%.

5. The Board of Tax Appeals erred in finding and holding that there is a deficiency for the year 1922 of $238,275.95.

6. The Board of Tax Appeals erred in failing to find and hold that, calculating profit on the basis of value at the time acquired, the Taxpayer is entitled to a refund for the year 1922 of $6,677.71.

7. In the alternative, the Board of Tax Appeals erred in failing to find and hold that, taxing the profit determined by the Commissioner at the capital gain rate, there is a deficiency for the year 1922 of $44,529.80.

IV

Wherefore, the Taxpayer petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, and that a transcript of record be prepared in accordance with law and the rules of said court and transmitted to the clerk of the said court for filing, and that appropriate action be taken to the end that the errors complained
74 of may be reviewed and corrected by said court, and that the decision, judgment, and order of the Board of Tax Appeals be reversed.

Respectfully submitted.

RUSSELL D. MORRILL.
Attorney for Petitioner on Review.
14 Wall Street, New York City, New York.

WHITE & CASE, ESQS.,
14 Wall Street, New York, N.Y.,
Of Counsel.

[*Duly sworn to by Russell D. Morrill; jurat omitted in printing.*]

75 Before United States Board of Tax Appeals

[Title omitted.]

Notice of filing petition for review

Filed July 1, 1933

To E. BARRETT PRETTYMAN, ESQ.,
General Counsel,
Bureau of Internal Revenue,
Internal Revenue Building, Washington, D.C.

SIR: You are hereby notified that the petitioner-petitioner on review on the 28th day of June 1933, filed with the clerk of the United States Board of Tax Appeals, Washington, D.C., a
76 petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Board

heretofore rendered in the above-entitled cause on April 11th, 1933. Two copies of the petition for review and assignments of error as filed are hereto attached and served upon you.

Dated at New York City, New York, this 28th day of June 1933.

RUSSELL D. MORRILL,
Attorney for Petitioner on Review,
14 Wall Street, New York City, N.Y.

Personal service of the above and foregoing notice, together with two copies of petition for review and assignments of error mentioned therein, is hereby acknowledged this 29th day of June 1933.

(Sgd.) E. BARRETT & PRETTYMAN,
Attorney for Respondent on Review.

77 Before United States Board of Tax Appeals

[Title omitted.]

Praecipe for record

Filed June 29, 1933

To the Clerk of the United States Board of Tax Appeals:

SIR: You will please prepare, transmit, and deliver to the United States Circuit Court of Appeals for the Second Circuit copies, duly certified as correct, of the following documents and records in the above-entitled cause, in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit heretofore filed by the petitioner-petitioner on review.

78 1. Docket entries of the proceedings before the Board.
2. Petition, with all exhibits thereto.
3. Answer.
4. Amended answer.
5. Transcript of hearing, had December 9, 1929.
6. Petitioner's exhibit 3.
7. Respondent's exhibit A.
8. Findings of fact and opinion of the Board, promulgated April 10, 1933.
9. Decision of the Board, entered April 11, 1933.
10. Petition for review, together with proof of service of notice of filing petition for review and service of two copies of petition for review.
11. This praecipe.

(Signed) RUSSELL D. MORRILL,
Attorney for Petitioner on Review,
14 Wall Street, New York City, N.Y.

Dated, June 28, 1933.

79 [Clerk's certificate to foregoing transcript omitted in printing.].

80 In United States Circuit Court of Appeals for the Second Circuit

No. 19. October term, 1933

Argued November 23, 1933. Decided December 18, 1933

NEW YORK TRUST COMPANY, AS TRUSTEE UNDER TRUST INDENTURE, Dated December 24, 1921, by and between Conrad Henry Matthiessen and Said The New York Trust Company, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals.

Before MANTON, L. HAND, and SWAN, Circuit Judges.

Petition to review an order of the Board of Tax Appeals fixing a deficiency in the petitioner's income taxes for the year 1922.

J. Du Pratt White, of New York City, for petitioner.

Helen R. Carloss, of Washington, D.C., for respondent.

Opinion

L. HAND, Circuit Judge.

One, Matthiessen, in order to make a settlement for his son, transferred six thousand shares of stock to the petitioner in trust to accumulate the income and pay the accumulations to the son when he became twenty-one, thereafter to pay him the income yearly until he became twenty-five, and at that time to transfer the shares to him. If the son died under twenty-five, the trustee was to transfer the shares to two other sons, share and share alike. Matthiessen bought the shares in 1906, for $141,375; when he transferred them to the trustee, on December 24, 1921, they were worth $577,600. The petitioner by virtue of its powers under the deed sold the shares in 1922 for $603,832. The questions arising are two: whether in estimating the "basis" upon which to calculate profits, the date of Matthiessen's purchase should be taken, or the date of the settlement; and whether, in case the first is the proper date, the tax is limited to twelve and a half percent. under section 206 (a) (6) and section 206 (b) of the Revenue Act of 1921 (42 Stat. 232). The Board held against the petitioner upon both points.

Section 202 (a) (2) of the act (42 Stat. 229) provided that when property was "acquired by gift", the "basis" in estimating profits was to be the cost or value when the donor acquired it. This was held constitutional in Taft *v.* Bowers (278 U.S. 470, 49 S.Ct. 199; 73 L.Ed. 460; 64 A.L.R. 362). And as the settlement was made after the act of 1921 was passed, the only question is as to the meaning of the statute. Was the transfer a "gift"? It was certainly not a "purchase", except in the archaic sense that all transfers of land, not by descent, were purchases. Colloquially perhaps, it was

a gift to the son, who alone got the benefit. Even so, it was nevertheless a gift; the transaction as a whole could not be less, though the trustee's part in it were regarded as only instrumental. Verbally all the conditions specified in section 202 (a) (2) existed; there was a gift and a donor, all that the section required. Again, its underlying purpose was to reach the appreciation which occurred in the hands of the donor, and which could not be taxed in any other way, for he had not "realized" it. That purpose demanded that such a transaction as this be included. So it seems to us immaterial upon whom the tax impinged: upon the trustee, the beneficiary, or
81 the "trust", though we do not read Anderson v. Wilson (289 U.S. 20; 53 S.Ct. 417; 77 L.Ed. 1004), as holding that a new entity has been conceived to bear taxation. Section 219 of the act (44 Stat. 246) imposes the burden either upon the trustee or the beneficiary, never upon the trust; so far as we can see, it speaks in the customary tongue. There was much more to be said for the taxpayer in Burnet v. Guggenheim (288 U.S. 280; 53 S.Ct. 369; 77 L.Ed. 748), where the cancellation of a power to revoke was held to be a "transfer by gift." That ruling could not have been made if trust settlements were not gifts: the settlor had transferred the property to a trustee, and the cancellation did no more than make absolute the trustee's title and the beneficiaries' interests. Finally, it is of no moment that in 1924 Congress amended the law by an express provision including "transfers in trust." Section 204 (a) (3), Revenue Act 1924 (26 U.S.C.A., § 935 (a) (3)) and note. If any inference from this is justified at all, it is rather that the amendment was a definition of earlier purpose than a new enactment. The Board was plainly right on the first point.

More is to be said for the taxpayer on the second, in spite of the fact that two circuits have ruled against him already. Johnson v. Commissioner (52 F. (2d) 726 (C.C.C.A. 3)); Shoenberg v. Burnet (60 App. D.C. 381; 55 F. (2d) 543). True, the trustee, the taxpayer, did not "hold" the property for two years in the usual sense. Moreover, it must be owned that section 206 (c) Revenue Act 1921 (42 Stat. 232), is a statute of exemption, and that as such doubts must be resolved against the taxpayer. (Hoge v. R.R. Co. (99 U.S. 348, 355; 25 L.Ed. 303); Bank of Commerce v. Tennessee (161 U.S. 134, 146; 16 S.Ct. 456; 40 L.Ed. 645); Heiner v. Colonial Trust Co. (275 U.S. 232, 235; 48 S.Ct. 65; 72 L.Ed. 256); Insurance, etc., Co. v. Commissioner (36 F. (2d) 842 (C.C.A. 2)).) Yet the result seems to us an extremely improbable one for Congress to have intended; it could hardly have survived direct scrutiny, had that been given it; it did not indeed survive after 1926. Section 208 (a) (8), Revenue Act 1926 (26 U.S.C.A. § 939) note. The upshot of the two sections, read as the Board reads them, is to treat the donee, for the purpose of computing his income, as holding the property during the period of the donor's tenure; but for the purpose of finding the rate at which

that very income is to be taxed, as holding it only from the time when he gets it. The periods are tacked to establish his "capital assets," and divorced to tax them; he gets all the burdens and none of the benefits; and while it is of course theoretically possible that Congress meant to do this, it is hardly more. We do not think that we do too much violence to the word by so declaring. Though the donee has not literally "held" the property for two years, he is treated as though he had; his acceptance of the gift is regarded as a vicarious substitution of himself for the donor. Only so can he become subject to a tax upon the whole appreciation "realized" by his sale, part of which is otherwise wholly foreign to him. All we have to do is to carry over that substitution into section 206 (a) (6); that is, to read the two sections together. In so doing we merely carry forward and make comprehensive the purpose of section 206 (c) itself, which was to avoid the "freezing" of property because of high surtaxes. (Report of Ways & Means Com. on House Rep. 8425, House Rep. 350, 67th Congress, first session, p. 10.) The classic instance of such a treatment of a statute is Holy Trinity Church v. United States (143 U.S. 457; 12 S.Ct. 511; 36 L.Ed. 226). We do not forget that courts must not make law, but only declare it; but there is no vade mecum to guide us between a sterile literalism which loses sight of the forest for the trees, and a proper scruple against imputing meanings for which the words give no warrant. That there comes a point at which we must be content to treat the purpose as ineffectively expressed, we readily agree, though no one can fix it a priori. But that does not absolve us in a given case, and here we find no sufficient obstacle in the language used; rather we think the generative purpose can infuse it.

Order reversed; deficiency to be taxed upon the income, as determined below, but at the rate prescribed by section 206 (c) of the Revenue Act of 1921.

MANTON, Circuit Judge, dissenting in opinion.

82 In United States Circuit Court of Appeals for the Second Circuit.

No. 119. October Term, 1933

Argued November 23, 1933. Decided December 18, 1933

NEW YORK TRUST COMPANY, AS TRUSTEE UNDER TRUST INDENTURE, Dated December 24, 1921, by and between Conrad Henry Matthiessen and Said The New York Trust Company, petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Appeal from the United States Board of Tax Appeals.

Before MANTON, L. HAND, and SWAN, Circuit Judges.

Dissenting opinion

MANTON, Circuit Judge (dissenting).

I dissent from that part of the opinion which accords to the appellant the benefits of section 206 (a) (6) and 206 (b) of the Revenue Act 1921. The conclusion reached is that, if the basis for determining the gain from the sale of stock is the cost to the donor, the appellant should be classified as one acquiring and holding for profit or investment, for more than two years the trust res and therefore entitled to be taxed on the capital net gain under the provisions of section 206 (b). But, however desirable it might be to grant relief to the taxpayer, still the statute requires the property to be held by it for more than two years. The trust is the taxpayer, and it had not held the property for more than two years. (Anderson v. Wilson (289 U.S. 20; 53 S.Ct. 417; 77 L.Ed. 1004). This statute is so clear in its terms that there is no room for interpretation, and the courts may not create a new statute by interpretation. (Caminetti v. United States (242 U.S. 470; 37 S.Ct. 192; 61 L.Ed. 442; L.R.A. 1917F, 502, Ann. Cas. 1917B, 1168); Hyde v. Shine (199 U.S. 62, 78; 25 S.Ct. 760; 50 L.Ed. 90); Lake County v. Rollins (130 U.S. 662, 670; 9 S.Ct. 651; 32 L.Ed. 1060; Ruggles v. Illinois (108 U.S. 526; 2 S.Ct. 832; 27 L. Ed. 812).)

As stated in the prevailing opinion, a different result was reached in Schoenberg v. Burnet, 60 App.D.C. 381, 55 F. (2d) 543, and Johnson v. Commissioner (52 F. (2d) 726 (C.C.A. 3)). No regulation of the collector has been made to the contrary to this construction of the statute. See article 1651, Reg. 62, 65. This administrative interpretation has the force and effect of law in view of the fact that Congress included the same definition of capital assets in the Revenue Act of 1924, § 208 (26 U.S.C.A., § 939, note).

Moreover, the change in the law by section 208 of the Revenue Act of 1926 (44 Stat. 9, 19, 20; (26 U.S.C.A., § 939, note), which gave the donee the right to add the period during which the property was held by the donor to the period of his ownership in measuring the two-year period, was not declaratory of existing law. It was a desire on the part of Congress to change the law. (United States v. Magnolia Petroleum Co., 276 U.S. 160; 48 S.Ct. 236; 72 L.Ed. 509.) (See House Reports No. 1, 69th Congress, 1st session, by Committee of Ways and Means, pp. 6, 7.) Congress could have had no purpose in enacting existing regulations into the law. It was not engaged in clarifying, but rather in changing, the law. The order should be affirmed.

83 In United States Circuit Court of Appeals, Second Circuit

NEW YORK TRUST COMPANY, AS TRUSTEE, ETC., PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment

Filed Dec. 26, 1933

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, reversed and cause remanded with directions to enter an order in accordance with the opinion of this court.

It is further ordered that a mandate issue to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

[File endorsement omitted.]

84 [File endorsement omitted.]

85 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1934

45 SUPREME COURT OF THE UNITED STATES

No. 873. October term, 1933

Order allowing certiorari

Filed April 9, 1934.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

46 Supreme Court of the United States

No. 899. October term, 1933

Order allowing certiorari

Filed April 9, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.